IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ADVANCEME, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**CAUSE NO. 6:05-CV-424 (LED)-(JDL)**
RAPIDPAY, LLC, BUSINESS CAPITAL	§	
CORPORATION, FIRST FUNDS LLC,	§	
MERCHANT MONEY TREE, INC.,	§	
REACH FINANCIAL, LLC and	§	
FAST TRANSACT, INC. d/b/a	§	
SIMPLE CASH,	§	
	§	
Defendants.	§	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT OF PATENT INVALIDITY

823,006_1

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I. INTRODUCTION

In Plaintiff's Opposition Brief of May 2, 2007 (Docket No. 248), Plaintiff—having no evidence to challenge the contemporaneous documents or the consistent deposition testimony of numerous knowledgeable and impartial witnesses—tries to confuse the Court: (1) by misrepresenting the clear language of the documents and witness testimony; (2) by attempting to add non-existent limitations to independent claims 1 and 10; (3) by purporting to challenge Defendants' fully supported Statement of Undisputed Facts with unsupported attorney argument that is often directed at different facts;[1] and (4) by purporting to create a fact issue by relying on unsupported conclusory allegations and speculation of its expert, who has no personal knowledge of the Clever Ideas/LeCard program or documents.

The Court should not tolerate such tactics and should once again affirm that:

> If the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must assert competent summary judgment evidence of the existence of a genuine fact issue. Mere conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. The party opposing summary judgment is required to identify evidence in the record and articulate the manner in which that evidence supports his claim.

Sparks v. Lowe's Home Centers, Inc., 341 F. Supp. 2d 671, 673 (E.D. Tex. 2004) (internal citations omitted) (emphasis added). Accordingly, each of Plaintiff's arguments should be rejected, and the Court should grant Defendants' Motion.

II. ARGUMENT

A. The Clever Ideas/LeCard Program Practiced Every Element of Claim 1

Plaintiff uses parts of pages 1 and 2, pages 4 through 8, and pages 14 through 19 of its Opposition Brief, to argue:

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[1] Defendants' Reply to Plaintiff's Opposition to Defendants' Statement of Undisputed Facts is attached hereto as Ex. V.

(1) that Diners Club forwarded the entirety of the Clever Ideas/LeCard payments to Clever Ideas;

(2) that Diners Club was not the merchant processor for Clever Ideas/LeCard transactions; and

(3) that Clever Ideas did not apply the entire amount received from Diners Club to reduce the merchants' obligation to Clever Ideas.[2]

Plaintiff's entire argument as to why the Clever Ideas prior art did not practice the elements of claim 1 is based on these three points. Plaintiff's arguments defy logic, are without foundation, and are consistently contradicted by every witness with personal knowledge of the Clever Ideas/LeCard program and by the contemporaneous documents.

1. Plaintiff's Argument that Diners Club Forwarded 100% of the Payment to Clever Ideas Defies Logic

In presenting its arguments on the first point above, Plaintiff relies repeatedly on documents and deposition testimony which confirm that Diners Club forwarded information regarding the Clever Ideas/LeCard transactions to Clever Ideas, but deliberately ignores the fact that these documents and testimony do not say that the entirety of the payments received by the merchant were forwarded to Clever Ideas. In fact, these documents and the testimony unequivocally establish that while the Clever Ideas/LeCard transaction information is all forwarded to Clever Ideas, Diners Club forwarded only a portion of the payments for those transactions to Clever Ideas.

That Plaintiff has attempted to confuse the Court is further demonstrated by the fact that, in ineffectually arguing against Defendants' undisputed facts dealing with the payments (as recited in the claims), Plaintiff deliberately changes the language in its arguments to refer to

[2] This argument is eliminated by virtue of the fact that Diners Club indisputably did not forward 100% of Clever Ideas/LeCard payments to Clever Ideas. *See infra* Part II.A.1. Because Diners Club forwarded 72% of Clever Ideas/LeCard payments to Clever Ideas, and Plaintiff acknowledges that Clever Ideas applied 80% of the payment amount to the merchant's outstanding obligation, Clever Ideas performed the application step of Claim 1. *See* Docket No. 232 at 6.

"transactions" instead of "payments." (*See*, *e.g.*, Docket No. 248, Appendix A, Statement Nos. 14-15, 18, 20, 23-24, 34, 44-45, and 48-50.) Plaintiff must redefine Defendants' statements of undisputed fact so that it can make irrelevant arguments and rely on out-of-context extracts from depositions and documents that deal with transaction information in its attempt to create a factual issues. (Id.)

Under Plaintiff's twisted version of the facts, for a $100 transaction at the merchant and forwarded electronically to Diners Club, Diners Club forwards the entire $100 payment to Clever Ideas. (Docket No. 248, pp. 5-6, 15-20.) Thus, according to Plaintiff, Diners Club keeps none of the $100 payment for itself. (Id.) Under this scenario, since Diners Club gives its members a 20% discount on Clever Ideas/LeCard transactions, Diners Club is losing $20 per $100 transaction, or a flat 20% on each Clever Ideas/LeCard transaction accepted by a merchant.

It is undisputed that Diners Club is the card issuer. (Docket No. 232, Ex. E, LC_00001, Ex. J, McBrearty Tr. 21:8-22:14, Ex. I, Sorwell Tr. 38:22-24.) It is also undisputed that Diners Club gave the customer a 20% discount on purchases.[3] (Id., Ex. P., LC_00014, Ex. G, Suckow Tr. 8:11-10:15, 26:13-27:12, Ex. H, Landon Tr. 11:7-19, 16:18-17-4, Ex. I, Sorwell Tr. 8:13-16, 10:6-15; Ex. Y, McBrearty Tr. 93:3-16, 106:6-107:1, 118:21-25.) It is further undisputed that for a $100 transaction, Diners Club would bill and collect $80 from the customer who presented the card to the merchant for payment. (Id.) It makes no business sense, and in fact defies business logic, for Diners Club to forward $100 to Clever Ideas and collect only $80 from the customer, thus losing $20, on every $100 Clever Ideas/LeCard transaction. In light of Plaintiff's illogical argument, there can be no doubt that Mr. Shamos' "interpretation" of the Clever Ideas documents and all of the deposition testimony improperly cited by Plaintiff to support its

[3] Plaintiff argues that there is no documentation supporting the fact that Diners Club gave a 20% discount. (Docket No. 248, p. 17.) Plaintiff is mistaken. (*See* Docket No. 232, Ex. P, LC_00014) ("Diners Club cardholders who register for the free LeCard program (800-234-6377) will get 20% off at 700 restaurants. . . .").

argument do not create a genuine issue of material fact.

Plaintiff attempts to cite select portions of the depositions of Lee Suckow, Edward Landon, Tom McBrearty and Gerrette Sorwell to show that for a $100 transaction, a $100 payment was sent from Diners Club to Clever Ideas. (Docket No. 248, p. 6.) However, when read in context, this testimony does not stand for the proposition Plaintiff is claiming. Rather, it merely reveals that all of the information related to the $100 transaction was sent to Clever Ideas, not the entire $100 payment—and that Clever Ideas took 100% of any particular merchant's Clever Ideas/LeCard transactions, not 100% of the customers' Clever Ideas/LeCard payments. (*See* Ex. Z, Suckow Tr. 115:22-120:19 (100% of merchants' transactions taken, which amounted to 3% of the merchant's business; but only a portion of payments forwarded from Diners Club to Clever Ideas); Ex. Y, McBrearty Tr. 31:6-32:10 ($100 transaction, not payment); Docket No. 232, Ex. I, Sorwell Tr. 26:15-29:6 ($100 transaction, not payment), Ex. H, Landon Tr. 23:4-19 ($100 transaction, not payment).) Given that each of these witnesses explicitly testified that Diners Club only forwarded a portion of the $100 payment to Clever Ideas, Plaintiff has no credible evidence to support its position. (*See* Docket No. 232, Ex. K, Findings of Fact Nos. 14, 48-50.)

Similarly, in interpreting the documentary evidence and testimony, Plaintiff and Mr. Shamos deliberately refer to the information related to the "transaction" instead of the "payment" made to Clever Ideas in an attempt to support their argument that 100% of the payment is forwarded from Diners Club to Clever Ideas. However, Plaintiff's and its expert's new, unsupported position even contradicts prior statements in Mr. Shamos' expert report: "Diners Club did not pay the merchant at all, but paid everything (net of its fees) to Clever Ideas . . . ." (Docket No. 248, Ex. 6 to Shamos Declaration, ¶ 91 (emphasis added).)

It is true that in the Clever Ideas/LeCard prior art the entirety of the transaction information was sent to Clever Ideas. Indeed, Clever Ideas needed to know the entire transaction information in order to determine what portion to reimburse to the restaurant as tax and tip, and what portion to credit the restaurant against its outstanding cash or advertising advance. However, the actual amount of money, i.e. the payment, that Diners Club forwarded to Clever Ideas was not the entire "payment" amount. As each and every witness with personal knowledge testified, the amount of money forwarded to Clever Ideas from Diners Club was equal to 72% of the transaction amount. (Docket No. 232, Ex. K, Finding of Fact No. 50.) As such, there can be no dispute that Diners Club forwarded a portion[4] - not 100% - of the payment to Clever Ideas.

2. Diners Club, Not Clever Ideas, Was Unequivocally The Computerized Merchant Processor in the Clever Ideas/LeCard Program.

Plaintiff's argument that Diners Club was not the merchant processor also finds no evidentiary or logical support.[5] Plaintiff's argument rests on its expert's unilateral "interpretation" of a document Clever Ideas produced which states:

> This summary included credit(s)/Charge(s) which could not be processed. The rejected credit(s)/charge(s) are listed below with a reason code explained at the end of this letter."

[4] Plaintiff also argues that Diners Club did not forward "at least a portion" of the payment specified in claim 1 because Diners Club did not forward a portion of what would have normally been sent to the merchant, and because the "at least a portion" referred to in the claims should be interpreted to be "one or more portions." (Docket No. 248, pp. 15-18.) Plaintiff's belated claim construction arguments find no support in the intrinsic record and cannot save the validity of claim 1. For example, Plaintiff's "multiple portions" argument has no support in the specification. It also makes no sense in light of the plain meaning of "at least a portion." In addition, throughout the specification the "at least a portion" referred to is a portion of the *payment received by the merchant* from the customer, not of the payment that would have been sent to the merchant after processing. (Docket No. 232, Ex. A, '281 patent, Abstract ("The merchant processor acquires the information related to the payment, . . . and forwards at least a portion of the payment to a loan payment receiver"), 1:66-2:2, 2:11-16, 2:20-22, 5:38-44.) Moreover the claims themselves refer to the *payment received by the merchant* from the customer, not the payment that would have been sent to the merchant after processing.

[5] For instance, even though Plaintiff does not dispute that Diners Club was the card issuer and electronically received information from the merchant related to the transaction, Plaintiff claims that Diners Club did not authorize the transaction. Plaintiff can articulate no reason why Diners Club, the card issuer and thus the ultimate authorizer of the transaction, would forward the transaction to Clever Ideas, and then Clever Ideas would turn around and send an authorization request back to Diners Club for the transaction.

(Docket No. 232, Ex. E, LC_00004.) The reason code referred to and stated in the document is: "This is a LeCard charge. LeCard will settle directly with you." (Id.) Plaintiff, using its expert's interpretation (which disregards all testimony about this exact document), argues that this document establishes that Diners Club was not the merchant processor in the Clever Ideas/LeCard prior art because it states that Diners Club rejected the charges, the charges could not be processed and LeCard would settle directly with the merchant. (Docket No. 248, pp. 14-15.)

However, Plaintiff fails to inform the Court that the particular document its expert "interprets" is a statement dated April 30th, while the relevant charges that the "rejection" and "could not process" language apply to occurred on April 17th. (Docket No. 232, Ex. E, LC_00004.) Hence, it is clear that this document is a summary of how Diners Club dealt with the already approved and already processed transactions. If in fact the charges had been "rejected" or "not processed" at the time they were presented (on April 17th), there would be nothing for LeCard to "settle directly with"[6] the merchant. (Id.) Given these undisputed facts, even a lay person would know that Mr. Shamos' uninformed, conclusory "interpretation" of the documents is unsupported speculation. This is particularly true given that in reaching his "interpretation," Mr. Shamos completely ignores the testimony of every witness with personal knowledge that explained clearly and logically what the passages in the document mean.

For example, Mr. McBrearty from Diners Club, when questioned by Plaintiff's attorney about the very documents that Mr. Shamos misconstrues, testified that for a $100 LeCard charge Diners Club was still the merchant processor. (Ex. Y, McBrearty Tr., 103:6-107:5, 117:1-119:18.) Mr. McBrearty also testified that the reason the document was generated was to notify the merchant that of the $600 in total charges submitted to Diners Club ($500 for Diners Club cards and $100 for Diners Club/LeCard cards) only $500 (less processing fees) was going to be paid to the merchant by Diners Club. (Id.) For the $100 Clever Ideas/LeCard transaction, Diners Club deducted the 20% customer savings, Diners Club took their processing fee, and forwarded the remainder of the payment amount to Clever Ideas, so Clever Ideas would settle the remainder of the transaction with the merchant. (Id.) Lee Suckow and Edward Landon of Clever Ideas were also questioned about these same documents and confirmed Mr. McBrearty's testimony. (Ex. Z, Suckow Tr. 103:13-105:19; Ex. AA, Landon Tr., 26:22-29:19.) Moreover, every witness, including former Clever Ideas (and AdvanceMe) employee Adam Secher, testified that after 1992, Clever Ideas never processed, authorized, or settled any of the Clever Ideas/LeCard transactions from a merchant. (Ex. Y, McBrearty Tr. 24:12-20; Docket No. 232, Ex. H, Landon Tr., 21:14-22:1, Ex. I, Sorwell Tr. 17:7-20, Ex. R., Secher Tr. 16:13-18; *see also* Docket No. 232, Ex. K, Findings of Fact Nos. 11-13.)

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[6] It is clear that the term "settle directly with you" in LC_00004 does not mean the same thing as the claim term "settling." According to the Court's claim construction, to which the Plaintiff agreed, "settling" means "the part of the transaction when an amount is transferred or credited to the merchant processor." (Docket No. 182.) Settlement within the meaning of the claims thus in no way involves the *merchant*. According to the document, and the relevant witness testimony, "settle directly with you" means that Clever Ideas would forward the tax and tip *to the merchant* and apply 80% of the payment to reduce the merchant's obligation. (Ex. Y, McBrearty Tr., 103:6-107:5; Ex. Z, Suckow Tr., 103:13-105:19; Ex. AA, Landon Tr., 26:22-29:19.) There can be no doubt that "settling," within the meaning of the claims, had already taken place at Diners Club for the April 17th transactions that are reflected in the April 30th summary statement.

Plaintiff's argument that there is no documentary evidence to show that Diners Club was the processor is also incorrect. (Docket No. 248, pp. 14-15.) Lee Suckow's July 1992 letter specifically identified Diners Club as the merchant processor. (Docket No. 232, Ex. D ("To be able to electronically draft capture your LeCARD transactions you will need to process directly to Diners Club and not through a licensed bank or other third party processor. If you are presently not processing to Diners Club you can direct your processor to make the switch . . . .") In addition, Mr. Suckow's October 1992 letter reaffirms that electronic capture of the Clever

Ideas/LeCard transactions is available "only to those restaurants that are processing directly to Diners Club." (Id., Ex. E.) Also, the cash and advertising advance agreements between Clever Ideas and the restaurants expressly required that the restaurants would process directly to Diners Club. (Ex. Y, McBrearty Dep. 56:16-57:18; Docket No. 232, Ex. B, LC_00008, ¶ 6, Ex. C, LC_00010, ¶ 6.) In light of this overwhelming documentary evidence, Plaintiff's statement on page 15 of its Opposition that "Defendants have not produced a single document which indicates that Diners Club processed and settled LeCard transactions" is simply untrue.

Accordingly, there can be no dispute that Diners Club, not Clever Ideas, was the merchant processor in the Clever Ideas/LeCard prior art. Moreover, there can be no dispute that Diners Club obtained authorization for the transaction, settled the transaction within the meaning of the terms as construed by the Court, and then forwarded a portion of the payment to Clever Ideas. There can also be no dispute that Clever Ideas applied the portion received to reduce the merchant's outstanding obligation to Clever Ideas. Plaintiff has cited no evidence to contradict the documents and testimony of any of the witnesses, and cannot rely on unsupported attorney argument or on baseless conclusory statements and speculation of its expert—which contradict the testimony of every witness with personal knowledge—to create a genuine issue of material fact.

B. Claim 10 is Anticipated by the Clever Ideas/LeCard Program

As with Defendants' Litle & Co. summary judgment motion (Docket No. 215), Plaintiff again argues that claim 10 requires that the merchant processor send a portion of the payment to the merchant as well as to the third party. As discussed below, Plaintiff's attempt to rewrite the claims, ignore the proper construction of the means plus function language, and disregard the undisputed evidence should be rejected.

1. Claim 10 Does Not Require that the Merchant Processor Forward Any Portion of the Payment to the Merchant

The only function recited in the "means for forwarding" element of claim 10 is the "forwarding a portion of the payment to the third party to reduce the obligation." The parties agreed in their joint claim construction chart submitted to the Court that this was the only recited function, and the Court adopted the parties' agreement in its claim construction order. (Docket No. 182.) Under well established Federal Circuit law, the only structure from the specification that should be construed to correspond to this function is the structure that is necessary to perform this claim function. *Northrop Grumman Corp. v. Intel Corp.*, 325 F.3d 1346, 1352 (Fed. Cir. 2003). While the Court identified column 5, lines 21-37 as containing the algorithm corresponding to claim 10's forwarding step, the only portion of that algorithm that should be included in the construction is the portion that is necessary to forward payment to the third party, *i.e.*, forwarding a specified amount to a third party. *Id.* It is improper to incorporate a function from the specification into claim 10 that is not specifically recited in the claim. *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1343 (Fed. Cir. 2001).

If Plaintiff had wanted to include an additional limitation in the claim reciting that the merchant is forwarded a portion of the funds, it could have explicitly included the language "and for forwarding a portion of the payment to the merchant" in claim 10. In fact, Plaintiff did have claims reciting that a portion of the payment is forwarded to the merchant, but that language was not carried forward to the issued claims. (Ex. W, Claims 20 and 29.) Instead, Plaintiff explicitly removed this limitation from the claims during prosecution. In response to Defendants' first summary judgment motion related to the Litle & Co. prior art, Plaintiff argued that the removal of this language, and subsequent insertion of the means plus function language showed an intent to incorporate both functions into issued claim 10. (Docket No. 237 at 6.) However, the objective facts reveal the transparency of Plaintiff's position—the additional limitation was omitted from the claim language, thus removing a requirement that another "portion" be forwarded to the merchant and broadening the claim. Because Claim 10 claims a "means for forwarding a portion of the payment to the third party" and not a "means for forwarding a portion of the payment to the third party and to the merchant," Plaintiff's argument lacks merit and should be rejected.

2. The Structure of Claim 10 Was Well Known and the Testimony is Unchallenged

As described in Defendants' Litle & Co. summary judgment motion, the structures of claim 10 were well known in the prior art. *See* Docket No. 215, pp. 8-10. That merchants and Diners Club used the claimed, well known equipment to perform the functions recited in claim 10 is definitively established by four separate witnesses. (*See* Docket No. 232, pp. 13-15.) Plaintiff offers no evidence in opposition to this testimony; instead, Plaintiff merely asserts that the contemporaneous documents do not establish that the claimed structures were used in the Clever Ideas/LeCard program and that all testimony should effectively be ignored. (Docket No. 248, p. 13.) Because four separate third party witnesses testified that the claimed structures were used in the Clever Ideas/LeCard program, and because testimony may corroborate other testimony (as described *infra* Part II.F), the uncontroverted evidence of claim 10's invalidity is corroborated.

C. Expert Testimony Is Not Required

Plaintiff once again argues that expert testimony is *required* to support a motion for summary judgment of invalidity. (Docket No. 248, pp. 10-11.) Plaintiff's argument should be rejected because it misapplies, and incompletely quotes, the *Schumer* case. The *Schumer* case cited by Plaintiff merely stands for the proposition that expert testimony is *typically* needed, not that it is required. *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1315 (Fed. Cir. 2002). In fact, expert testimony is not required, particularly when the technology at issue is not complex. *Centricut, LLC v. ESAB Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004) ("In many patent cases expert testimony will not be necessary because the technology will be easily understandable. . . ."); *Union Carbide Corp. v. Am. Can Co.*, 724 F.2d 1573 (Fed. Cir. 1984).

D. Because There Was Extensive Commercial Use of the Clever Ideas/LeCard Prior Art, There Was a Public Use and the Clever Ideas/LeCard Prior Art Was Publicly Known

1. The Clever Ideas/LeCard Prior Art Was Publicly Used

Even though the Clever Ideas/LeCard prior art program was commercially used without any effort to conceal it, Plaintiff's Opposition argues there was no public use of this system. Plaintiff argues that "the Defendants are required to demonstrate by clear and convincing evidence that the performance of the *claim elements* was available to the public." (Docket No. 248, p. 20.) Plaintiff simply misstates the law of public use; as explained below, all that is required for a use to be "public" within the meaning of 35 U.S.C. § 102(a) or (b) is that the prior art be used in the ordinary course of business without efforts to conceal it.[7] Because these requirements are satisfied by the Clever Ideas/LeCard prior art, the Court should grant Defendants' Motion.

It is well-settled that, as reiterated in several recent Federal Circuit decisions:

> [T]he public use doctrine requires an inquiry into whether the invention was used in its natural and intended way. . . . A prior use is public even if there is no effort to show the invention to the public at large, even if the invention is completely hidden from view, even if viewers of a machine incorporating the invention do not comprehend the invention. There simply is no requirement that the prior user make an effort to make the invention publicly accessible, so long as he or she uses it in the ordinary course of business without efforts to conceal it."

[7] Plaintiff does not dispute the Clever Ideas system was used commercially for years. (Docket No. 232, Ex. K, Undisputed Fact No. 61.)

Nat'l Research Development Corp. v. Varian Associates, Inc., 822 F. Supp. 1121, 1133 (D.N.J. 1993) (citations omitted), *aff'd in relevant part*, 1994 U.S. App. LEXIS 1493 (Fed. Cir. 1994) (unpublished) ("[U]se by only one member of the public, without that use informing other members of the public as to the true nature of the invention, is sufficient under Supreme Court jurisprudence to invalidate a patent under section 102(b) for prior public use.").

In *New Railhead Manufacturing v. Vermeer Manufacturing Co.*, the Federal Circuit found that performance of the claimed method of drilling in rock under public land, hidden from view, constituted public use. 298 F.3d 1290, 1298-1300 (Fed. Cir. 2002). The Court specifically found that the "suggestion that the patented method was not in public use because one could not view the drill bit or see it in operation rings hollow because 'it is not public knowledge of his invention that precludes the inventor from obtaining a patent for it, but a public use or sale of it.'" *Id.* at 1299 (*citing TP Labs., Inc. v. Professional Positioners, Inc.*, 724 F.2d 965, 970 (Fed. Cir. 1984)). As Plaintiff's argument reveals, it disputes only that the Clever Ideas/LeCard program was publicly known, not that it was publicly used.

The Federal Circuit did not even analyze, as Plaintiff suggests the Court must do in its public use analysis, whether each claim element was "available to the public." (*See* Docket No 248, p. 20.) Nor did the Federal Circuit question whether any member of the public ever went underground to observe the drilling method. Instead, the court held that "[t]he statutory phrase 'public use' does not necessarily mean open and visible in the ordinary sense; it includes any use of the claimed invention by a person other than the inventor who is under no limitation, restriction, or obligation of secrecy to the inventor." *New Railhead Manufacturing*, 298 F.3d at 1297; *Netscape Communications Corp. v. Konrad*, 295 F.3d 1315, 1320 (Fed. Cir. 2002);

Lockwood v. American Airlines, 107 F.3d 1565, 1570 (Fed. Cir. 1997).[8] Therefore, because the Clever Ideas/LeCard prior art was used in its natural and intended way, without efforts to conceal it, it was publicly used within the meaning of 35 U.S.C. § 102(a) and (b).

Plaintiff has not alleged that it was secret that merchants accepted customer identifiers and electronically forwarded information related to the payment to Diners Club. Plaintiff has not alleged that it was secret that Diners Club acquired, authorized, and settled card transactions. Nor does Plaintiff allege that it was confidential that Diners Club forwarded payment to Clever Ideas, or that the Clever Ideas/LeCard program was not used in its natural and intended way. Indeed, even the patent acknowledges that the processing of card transactions was known in the prior art, and thus the public was aware that these claimed steps were necessarily performed in the Clever Ideas/LeCard prior art. (Docket No. 232, Ex. A, '281 patent, 1:17-22, 3:10-5:3, Ex. E.)

Plaintiff's argument thus boils down to a single specious position: that "the manner in which payments were authorized, settled, forwarded, or applied under the Clever Ideas/LeCard program was completely invisible to the public, and was protected under Clever Ideas' policy of confidentiality." (Docket No. 248, p. 20.) This argument is precisely the argument made by the plaintiff in *Lockwood* and explicitly rejected by the Federal Circuit. 107 F.3d at 1570 ("It is undisputed, however, that the public was aware that [Defendant's system] possessed this capability and that the public had been using [Defendant's system] . . . prior to [Plaintiff's] date of invention."). Plaintiff does not argue, because it cannot, that the public was unaware that the

[8] In *Lockwood v. American Airlines*, the district court found that American Airlines' SABRE computer reservation system was publicly used, accurately stating that "[a]ny non-secret use of a completed and operative invention, in its natural and intended way, open to the public, is a public use." 1995 U.S. Dist. LEXIS 20548, *4 (S.D. Cal. 1995). The Federal Circuit affirmed the district court's finding, rejecting the plaintiff's argument that, because "critical aspects" of the American Airlines system, such as the inner workings or hardware and software requirements (in the context of a means-plus-function claim), were not accessible to the public, it was not publicly used. *Lockwood v. American Airlines*, 107 F.3d at 1570.

claim elements were performed; instead, it argues that the manner in which those elements were performed was not available to the public. However, the public's alleged lack of knowledge regarding the manner in which elements of the Clever Ideas/LeCard program were performed is wholly irrelevant to the Court's public use analysis.

Plaintiff cites only excerpts from two depositions in support of its position.[9] Neither excerpt establishes that the relevant features of the Clever Ideas/LeCard prior art were kept confidential. The testimony cited by Plaintiff simply states that: (1) certain merchant information (e.g., merchant bank account numbers, amount of processing fees paid by merchants to Diners Club, and amounts processed by Diners Club) was confidential; (2) unidentified business arrangements between Diners Club and Clever Ideas would have been confidential; (3) "[i]t's possible" that unidentified intimate details of the authorization components were not widely known; and (4) Mr. Landon could not speculate as to whether others in the industry knew unidentified details of Diners Club's processing. *See* Edelman Decl., Ex. C (Landon Dep. 62:13-64:16, 66:18-67:6) and Ex. D (McBrearty Dep., 82:3-83:9).

This scant testimony does not raise a question of fact as to whether Clever Ideas or Diners Club made affirmative efforts to conceal the Clever Ideas/LeCard program or its operation. In fact, all evidence supports the opposite conclusion—that the Clever Ideas/LeCard program was commercially used in the ordinary course of business more than one year prior to July 9, 1997, without efforts to conceal relevant facts about its operation. (*See* Docket No. 232, Exs. B-J.) Indeed, the evidence shows that the Clever Ideas/LeCard program could only exist as a result of widespread marketing and advertising. *Id*. The '281 Patent is thus invalid under 35

[9] It should also be noted that Plaintiff entirely disregards all testimony of witnesses with personal knowledge of the Clever Ideas/LeCard program in misinterpreting contemporaneous documents in an attempt to distinguish the Clever Ideas/LeCard prior art from the claims, although relies solely on those same witnesses' testimony in an attempt to negate public use.

U.S.C. § 102(a) and (b).

2. The Clever Ideas/LeCard Prior Art Was Publicly Known

Although Defendants have established knowledge of the Clever Ideas/LeCard prior art by numerous persons, only one person is required. *Coffin v. Ogden*, 85 U.S. 120, 124-25 (1873) ("The prior knowledge and use by a single person is sufficient. The number is immaterial."). The '281 Patent, as well as Plaintiff, acknowledges that the combination of elements for the processing of card transactions was known in the art. (Docket No. 232, Ex. A, '281 patent, 1:17-25.) The only alleged novelty of the invention is modifying the prior art payment processing method and system such that the merchant processor sends at least a portion of the payment to a payment receiver or third party to whom the merchant owes an obligation. (Id., arrow 29 in Figure 2.) The fact that the Clever Ideas/LeCard prior art performed this allegedly novel element was disclosed by the October 1992 letter from Lee Suckow to participating restaurants, and was thus known by many people. (Docket No. 232, Ex. E.) Moreover, Clever Ideas employees frequently discussed the operation of the Clever Ideas/LeCard program with prospective restaurants and in marketing materials, including the fact that Diners Club would forward payment to Clever Ideas. (Docket No. 232, p. 7 and evidence cited therein). How to perform the claimed invention was thus known by someone other than Barbara Johnson before the '281 Patent's date of invention, and the '281 patent is therefore invalid under 35 U.S.C. § 102(a).[10]

E. Plaintiff Does Not, And Cannot, Argue That The Clever Idea/LeCard Prior Art Was Abandoned, Suppressed or Concealed.

As discussed above with respect to public use, the evidence also shows that the Clever Ideas/LeCard prior art had not been "abandoned, suppressed, concealed" for purposes of 35

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[10] Plaintiff does not even attempt to dispute the fact that the Clever Ideas/LeCard program was publicly known in its Opposition. As described above, its argument is directed only to public use, in which it conflates the requirements for public use with a misunderstanding of the requirements for public knowledge.

U.S.C. § 102(g). "Abandonment" of an invention does not occur where there is reasonable diligence between the time of conception and either commercialization or public disclosure of the invention. *See Palmer v. Dudzik*, 481 F.2d 1377, 1387 (C.C.P.A. 1973). It is clear from the contemporaneous documents that the Clever Ideas/LeCard program was quickly put into commercial use—and thus not abandoned. (Docket No. 232, Ex. B (cash advance agreement), Ex. C (Advertising agreement), Ex. D (July 1992 letter), Ex. E (October 1992 letter).)

Regarding suppression or concealment, it applies only

> . . . when an inventor actively conceals his invention from the public. *Fujikawa v. Wattanasin*, 93 F.3d 1559, 1567 (Fed. Cir. 1996). Active concealment "refers to situations in which an inventor designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public." *Id.*

Eolas Tech. v. Microsoft Corp., 399 F.3d 1325, 1333 (Fed. Cir. 2005). Here, there is no evidence of active concealment with respect to the Clever Ideas/LeCard prior art program, as confirmed by the October 1992 letter from Lee Suckow and the unequivocal, uncontroverted testimony of multiple witnesses. (*See* Part II.D.1, *supra*.) Consequently, the claims of the '281 patent are also invalid under 35 U.S.C. § 102(g)(2).

F. There Is Ample Evidence Establishing and Corroborating the Extensive Use of the Clever Ideas/LeCard Prior Art

Plaintiff's argument that the Clever Ideas/LeCard prior art is insufficiently corroborated, like its public use argument, is based on a flawed understanding of Federal Circuit law. With a proper understanding of the law, it is apparent that Plaintiff's disregard for the uncontroverted testimony of numerous witnesses is wholly improper and that all relevant aspects of the Clever Ideas/LeCard program have been definitively established through corroborated evidence.

First, corroboration is only required of oral testimony—and not contemporaneous documents. *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572 (Fed. Cir. 1996); *Price v. Symsek*, 988

F.2d 1187, 1195-96 (Fed. Cir. 1993). Thus, to the extent that the Clever Ideas/LeCard program is described in contemporaneous documentation, a corroboration inquiry is unnecessary.

Second, corroboration may be in the form of either documentary or testimonial evidence. *Lacks v. McKechnie Vehicle Components USA, Inc.*, 322 F.3d 1335, 1349 (Fed. Cir. 2003); *Sandt Tech. v. Resco Metal and Plastics Corp.*, 264 F.3d 1344 (Fed. Cir. 2001) ("Additionally, oral testimony of someone other than the alleged inventor may corroborate an inventor's testimony."). Plaintiff's complete disregard for the testimony of all witnesses with personal knowledge of the Clever Ideas/LeCard program is thus improper. Each witness' testimony corroborates each other witness' testimony, and all witness testimony is fully corroborated by, and consistent with, the contemporaneous documentation.[11] Plaintiff's conclusory statements regarding a lack of corroboration thus ring hollow and are insufficient to prevent summary judgment. *See Typeright Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1158 (Fed. Cir. 2004) ("Summary judgment should not be denied simply because the opposing party asserts that the movant's witnesses are not to be believed.").

In determining whether oral testimony is corroborated, the Federal Circuit applies a "rule of reason" analysis. *Price v. Symsek*, 988 F.2d 1187, 1195 (Fed. Cir. 1993); *Woodland Trust v. Flowertree Nursery, Inc.*, 148 F.3d 1368, 1371 (Fed. Cir. 1998); *Sandt Tech.*, 266 F.3d at 1350-51; *Knorr v. Pearson*, 671 F.2d 1368, 1374 (C.C.P.A. 1982) ("The law does not impose an impossible standard of 'independence' on corroborative evidence by requiring that every point [necessary to prove invalidity] be corroborated by evidence having a source totally independent of the inventor; indeed such a standard is the antithesis of the rule of reason.").

Plaintiff's entire argument in opposition to Defendants' Second Motion rests on Mr.

[11] Plaintiff also implies that Defendants have not presented to the Court all relevant documents produced to them by Clever Ideas. However, Defendants have produced ALL documents that Clever Ideas was able to locate concerning the Clever Ideas/LeCard program. *See* Ex. X, Declaration of Gerette Sorwell.

Shamos' unilateral misinterpretation of the documentation that was fully explained (contrary to Dr. Shamos' explanation) by Clever Ideas and Diners Club employees with personal knowledge of the Clever Ideas/LeCard program as well as that specific documentation at their depositions. Plaintiff argues that, although all third party testimony cited by Defendants (from eight separate witnesses) had personal knowledge of the operation of the Clever Ideas/LeCard program and (for four of the witnesses) of the contemporaneous documents, all such testimony must be disregarded because some of them "are [allegedly] employed by other infringers," and thus their testimony is uncorroborated. (Docket No. 248, p. 2.) Such an argument is contrary to reason and should be rejected.

It should first be noted that Plaintiff does not contend that the following witnesses are biased: Tom McBrearty, Adam Secher, and Michelle Boudette. As these three witnesses, alone, testified consistently as to the operation of the Clever Ideas/LeCard program set forth in the contemporaneous documents and in Defendants' Motion, the Court's analysis should end here. *See Knorr v. Pearson*, 671 F.2d 1368 (C.C.P.A. 1982) (finding that one witness' testimony sufficiently corroborated the defendant's testimony regarding prior art). Moreover, Mr. McBrearty had personal knowledge of the documents that Dr. Shamos now attempts to misinterpret in a vacuum—disregarding even Mr. McBrearty's admittedly unbiased testimony concerning those exact documents. (*See, e.g.*, Ex. Y, McBrearty Dep. 103:6-107:1.)

Plaintiff also argues that Clever Ideas "switch[ed] to the inventions set forth in AdvanceMe's patent" at some point, thus testimony from all three Clever Ideas witnesses should be wholly disregarded. If Clever Ideas copied AdvanceMe's invention, why did AdvanceMe offer to pay Lee Suckow, Chairman and CEO of Clever Ideas, to be an expert consultant in this case? (Ex. Z, Suckow Tr. 60:3-23; Ex. U, Ex. 6 to Suckow Tr., Letter from Robert Matz to Lee

Suckow, July 28, 2006.) And why did AdvanceMe not establish such infringement (in an attempt to show bias) at Mr. Suckow's deposition? In fact, when Lee Suckow was asked about Clever Ideas' current program, he testified that it was no different than what they had been doing for years. (Ex. Z, Suckow Tr. 117:7-118:7.) The testimony cited by Plaintiff does not contradict this and does not show that Mr. Suckow is biased. (*See* Docket No. 248, p. 10.) In fact, the portions of Mr. Suckow's testimony cited by Plaintiff show that Clever Ideas "has no dog in this fight" and confirms Mr. Suckow's previous testimony—again showing that what Clever Ideas is currently doing is no different than what it had been doing since the early 1990s in the Clever Ideas/LeCard program. (Ex. Z, Suckow Tr. 126:18-129:5.) By speculating that Clever Ideas is currently infringing the '281 patent, Plaintiff is admitting that the Clever Ideas/LeCard prior art anticipates the claims of the '281 patent. *Peters v. Active Mfg. Co.*, 129 U.S. 530, 537 (1889) ("That which infringes, if later, would anticipate if earlier.")

Plaintiff additionally argues that Jeannette Gepford's testimony should be disregarded because she allegedly "left AdvanceMe to work for another company that got paid for its cash advances through payments from a merchant processor, the method set forth in the '281 patent." (Docket No. 248, p. 9.) AdvanceMe's only evidence that Ms. Gepford's current employer currently infringes the '281 patent is six lines of testimony. (*Id.* at 9, Ex. I, Gepford Dep. 80:10-16.) It is peculiar that AdvanceMe is willing to definitively label a non-party an infringer based on six lines of testimony from a single deposition, yet disregard all testimony from eight witnesses regarding the Clever Ideas/LeCard prior art. Regardless, Defendants rely upon Ms. Gepford's testimony solely to show that the Clever Ideas/LeCard program was well known—even by AdvanceMe's own employees.

When a plaintiff similarly argued lack of corroboration in the context of a motion for summary judgment of invalidity, the Federal Circuit stated that "[e]ach corroboration case must be decided on its own facts with a view to deciding whether the evidence as a whole is persuasive." *Sandt Tech.*, 264 F.3d at 1350 (internal citations omitted). "[A] tribunal must make a reasonable analysis of all of the pertinent evidence to determine whether the inventor's testimony is credible. The tribunal must also bear in mind the purpose of corroboration, which is to prevent fraud, by providing independent confirmation of the inventor's testimony." *Kridl v. McCormick*, 105 F.3d 1446, 1450 (Fed. Cir. 1997). The facts of this case show that the contemporaneous documentation, in addition to the unwavering, consistent testimony of eight separate third party witnesses, is credible and persuasive. The claims of the '281 patent are invalid as a matter of law.

G. Claims 2-4 and 11-13 Are Obvious

Plaintiff has made no credible argument for why claims 2-4 and 11-13 of the '281 patent are not obvious in view of the Clever Ideas/LeCard prior art. (Docket No. 248, pp. 21-23.) As explained above, there can be no dispute that the Clever Ideas/LeCard prior art anticipates claims 1 and 10. In addition, Plaintiff's expert admits that the Diners Club card was a charge card, thus invalidating dependent claims 5 and 14. (Docket No. 248, Shamos Decl., Ex. 6, ¶103.) Plaintiff also admits that "from a processing standpoint the steps for processing of a credit card and charge card are the same." (Docket No. 248, p. 22.; Id., Shamos Decl., Ex. 6, ¶ 95.) Moreover, Plaintiff has provided no evidence to rebut the fact that the equipment used by merchants to accept payment was capable of accepting charge, debit, credit, and smart cards. (Docket No. 232, Appendix A, Findings of Fact Nos. 35, 36, 38, and 40.) In view of this evidence and the fact that the '281 patent specification equates all of these types of cards, and the PTO Examiner took notice that each of the cards were old and well known types of "credit" used by customers to pay for goods and services, it cannot be questioned that claims 2-4 and 11-13 are obvious.

III. ADVANCEME'S STATEMENTS ABOUT THE PROBLEMS OF THE PRIOR ART AND THE SUPPOSED INVENTIONS OF THE '281 PATENT ARE IRRELEVANT.

Plaintiff devotes a section of its Opposition Brief to explaining the purported problems of the prior art, and how supposedly the inventions of the '281 patent perfectly fit a gap left open by the prior art. (Docket No. 248, pp. 2-4.) Plaintiff's argument is unpersuasive because all of the supposed distinctions from the prior art that Plaintiff attempts to tout are completely irrelevant to the claims of the '281 patent. For example, Plaintiff characterizes some of the problems of the prior art, and in particular the prior art dining programs like Clever Ideas, as being "membership-based programs" that made "the merchant's cash flow more difficult to predict." (Id.) Of course neither the '281 patent, nor the claims of the '281 patent, ever discuss any merchant cash flow concerns, or any membership vs. non-membership programs.[12] Accordingly, Plaintiff's supposed distinctions are irrelevant to the Court's determination of Defendants' Motion.

IV. CONCLUSION

There is no genuine issue of material fact that claims 1, 5-7, 9-10, 14-16, and 18-19 are invalid as a matter of law under each of 35 U.S.C. § 102(a), (b) and (g)(2) in light of the Clever Ideas/LeCard prior art. In addition, there is no genuine issue of material fact that dependent claims 2-4 and 11-13 are obvious under 35 U.S.C. § 103. Accordingly, Defendants respectfully request that this Court grant summary judgment invalidating claims 1-7, 9-13, 14-16 and 18-19 of the '281 patent in view of the Clever Ideas/LeCard prior art discussed in this motion.

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[12] While AdvanceMe considered these features to be its competitive advantage in the market for cash advances in 1998 and 1999, they are wholly irrelevant to the validity of the patent claims. (*See, e.g.*, Docket No. 226, Ex. D to Edelman Decl. at CH_0083-84.) AdvanceMe's biggest competitors, the dining programs (including Clever Ideas/LeCard) practiced precisely the invention AdvanceMe claims to have invented well before AdvanceMe ever filed a patent application. (Id.)

May 9, 2007

Respectfully submitted,

By: :Joseph D. Gray

William G. Schuurman
Texas State Bar No. 17855200
bschuurman@velaw.com
Brian K. Buss
Texas State Bar No. 00798089
bbuss@velaw.com
Joseph D. Gray
Texas State Bar No. 24045970
jgray@velaw.com
R. Floyd Walker
Texas State Bar No. 24044751
fwalker@velaw.com
Graham E. Sutliff
Texas State Bar No. 24046935
gsutliff@velaw.com
VINSON & ELKINS L.L.P.
2801 Via Fortuna, Suite 100
Austin, Texas 78746
Telephone: 512.542.8400
Facsimile: 512.236.3476

Hilary L. Preston
hpreston@velaw.com
VINSON & ELKINS L.L.P.
666 Fifth Avenue – 26th Floor
New York, NY 10103
Telephone: 212.237.0000
Facsimile: 212.237.0100

Douglas R. McSwane, Jr.
State Bar No. 13861300
J. Matt Rowan
State Bar No. 24033137
POTTER MINTON
A Professional Corporation
110 N. College
500 Plaza Tower (75702)
P.O. Box 359
Tyler, Texas 75710
Telephone: 903.597.8311
Facsimile: 903.593.0846
E-mail: dougmcswane@potterminton.com

Counsel for Defendants First Funds LLC, Merchant Money Tree, Inc., and Reach Financial, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by First Class Mail on this the 9th day of May, 2007.

/s/ Joseph Gray
Joseph D. Gray